78-616

Supreme Court, U. S.
FILED
OCT 10 1978
MICHAEL RODAK, JR., CLERK

APPENDICES

APPENDIX A

OCTOBER TERM 1978

ROBERT MARKUS

v.

PHILIP ROSS

Text of the
NOTICE OF DETERMINATION TO CLAIMANT

May 13, 1976

1. NOTICE OF DETERMINATION OF INELIGIBILITY
You are not eligible for unemployment insurance benefits for the period and reason indicated by the box that is checked. /X/ Beginning December 1, 1975 and until the reason for your ineligibility no longer exists You are not totally unemployed. The determination is based on the following: You are self employed as a lighting consultant.

2. NOTICE OF DETERMINATION OF OVERPAYMENT AND REQUIREMENT FOR REPAYMENT
As a result of the above determination, you have been overpaid $913. This overpayment is recoverable and must be repaid because You were paid on incorrect information.

3. NOTICE OF DETERMINATION OF WILFUL MISREPRESENTATION
It is determined that on dates 12/10 12/14, 12/24, 12/31, 1/7, 1/14, 1/21 1/28, 2/4, 2/11, 2/18, 2/25, 3/10, 3/17 3/24, 3/31, 4/7, 4/14, 4/21, 4/28, and 5/5/76 you wilfully made false statements to obtain benefits. Therefore your right to further benefits between now and 5/4/78 (when this penalty expires) is reduced by 83 effective days. This penalty is imposed because: You certified to being totally unemployed when you knew that you were self employed as a lighting consultant

P. Weinsler
Claims Examiner
FOR THE INDUSTRIAL COMMISSIONER

Text of the Determination dated May 18, 1976

In connection with your claim for unemployment insurance benefits please refer to the box(es) checked below:

/2/. The determination dated stating you are ineligible for unemployment insurance benefits beacuse of wilful misrepresentation only is withdrawn. The other determinations issued on that date remain in effect. + Your hearing request on these other issues is being processed.

FOR THE INDUSTRIAL COMMISSIONER
By: P. Weinsler

TEXT OF THE REFEREE'S DECISION
Mailed and duly filed August 9, 1976

FINDINGS OF FACT: A hearing was held at which claimant and a representative of the Industrial Commissioner appeared and testified.

By initial determination effective December 1, 1975, claimant was ruled ineligible because he was not totally unemployed. He was overpaid $913 and the overpayment was ruled to be recoverable. His rights to future benefits were reduced by 83 effective days for wilful misrepresentations; but that determination was withdrawn at the hearing by the Industrial Commissioner's representative.

Claimant, admittedly, a lighting consultant in the theater industry and a member of a union associated with such industry, filed a valid original claim for benefits effective December 1, 1975. On the basis of claimant's employment as a building superintendent, which employment ended November, 1975, claimant was awarder a benefit rate of $44 weekly. He received regular weekly benefit

payments at his weekly benefit rate from December 14, 1975 through May 2, 1976, totalling $913. He indicated in his insert booklet on April 29 that he had been employed that day. In the following week on May 7, he further indicated employment. As a result of such indicated employment, claimant was required to refile an additional claim effective May 4, at which time claimant indicated that his last date of employment was April 29, 1976, and his reason for separation from employment was due to the employment being temporary.

Claimant further listed himself as self-employed. At the local insurance office interview held on May 12, claimant stated, "I have had my own business as a lighting consultant for three years at the listed premises where I was formerly employed as a building superintendent. Although my mailing address is at 350 Canal Street. I cannot estimate how much time I devoted to the business. I spend some time every day. When I filled out the various refiling forms, I wrote "self-employed". I am referring to work that I do for a particular client for which I will be paid."

At the Referee hearing, claimant testified that the only employment he had was on the two days that he had indicated that he had been employed in his insert booklet and named the employer for whom he worked. He further testified that he spends two to four hours each day looking for employment as a lighting consultant, which was the type of employment that he did the two days he stated he was employed.

OPINION: Although claimant, at the hearing, attempted to refute his statement made at the local insurance office that he had been conducting self-employment in his own business as a lighting consultant for three years, at the specific address at which he still maintains a lease, and attempted to narrow and confine such employment to merely two days during the period in question, it is significant that the claimant, who was told to produce books and records relating to his business as a lighting consultant and tax returns for 1975 to date, did not present such required documentation at the hearing. Claimant's statements made at the local insurance office regarding his self-employment and his testimony submitted at the hearing

establishing that he daily devotes substantial time in an endeavor to maintain his business establishes that claimant, during the period involved, was not totally unemployed and is, therefore, ineligible to receive benefits. The benefit payments claimant received totalling $913 constituted a recoverable overpayment because such benefit payment was obtained although claimant was not totally unemployed. Since the issue of wilful misrepresentation has been withdrawn by the Industrial Commissioner's representative, that issue is academic and need not be ruled on.

DECISION: The initial determination ruling claimant ineligible because not totally unemployed is sustained. The overpayment is recoverable.

GEORGE HENDERSON
Referee

TEXT OF THE DECISION OF THE APPEAL BOARD
mailed and filed in the Department of Labor
on NOV 24 1976

The claimant appeals from the decision of the referee filed August 9, 1976 sustaining the initial determinations of the local office holding him ineligible to receive benefits effective December 1, 1975 because he was not totally unemployed and charging him with an overpayment of $913 in benefits, ruled to be recoverable.

A hearing was held before the referee at which all parties were accorded a full opportunity to be heard and at which the claimant and a representative of the Industrial Commissioner appeared and testimony was taken. The Board considered the arguments contained in claimant's written statement submitted on appeal.

After a review of the record including testimony and evidence adduced before the referee and due deliberation having been had thereon, and having found that the referee's findings of fact and opinion are fully

supported by the record, and that no errors of fact or law appear to have been made, the Board adopts the findings of fact and the opinion of the referee as the findings of fact and the opinion of the Board.

DECISION: The decision of the referee is affirmed.

JAMES R RHONE, Member
G. DOUGLAS PUGH, Member

TEXT OF THE DECISION OF THE APPEAL BOARD
mailed and filed in the Department of Labor
on JAN 25 1977

The claimant applies, pursuant to Section 534 of the Law, to reopen and reconsider the decision of the Board filed November 24, 1976 (Appeal Board 232,819) affirming the decision of the refereee filed August 9, 1976 sustaining the initial determinations of the local office holding him ineligible to receive benefits effective December 1, 1975 because he was not totally unemployed and charging him with an overpayment of $913 in benefits, ruled to be recoverable.

Upon due consideration of the entire record herein, and

After due deliberation having been had on the claimant's application to reopen and reconsider the Board's prior decision, as aforesaid, now, therefore,

Based on the record and testimony in this case and on all of the proceedings heretofore had herein, the Board makes the following

FINDINGS OF FACT: The claimant filed an original claim for benefits effective December 1, 1975. His last employment as a building superintendent had terminated under non-disqualifying circumstances. Since about 1973, he has been self-employed as a lighting consultant for galleries and employed as a lighting technician for motion picture productions. He conducted this business from a studio, located at a different address than his residence. At least until mid-January, 1976, he maintained a telephone answering machine to monitor his calls to the telephone number listed at the address of his studio. He spent about two to four hours per day in efforts to obtain bookings for his consultant business. He also sought employment as a set construction worker through a union of which he is a member, although he has not passed a qualifying examination given by the union for this position.

The claimant marked his calendar insert with "N"'s, indicating that he had done no work at all, for every day from December 1, 1975 through May 12, 1976, except for April 29th and May 7, 1976. For those two days, he indicated that he did some work as a lighting consultant; he advised the local office that he was required to supply his own equipment. He received $913 in benefits during this period. He refiled for benefits on May 5, 1976, stating that he last worked on April 29, 1976 and was "self-employed".

The notice of hearing advised the claimant to produce his books, records, and tax returns. The referee did not request him to present any of these documents at the said hearing.

OPINION: The credible evidence establishes that the claimant performed services in furtherance of his own business as a lighting consultant and technician. He contends that the usual method of obtaining "employment" in this occupation is to establish a free-lance consulting business, he hired on an individual project basis, and to submit itemized bills for labor and expenses. He maintained a separate business address for his studio and utilized a telephone answering machine to monitor calls to his business telephone number. He spent from two to four hours per day in this business, trying to obtain bookings. His contention that this is the usual method of obtaining employment in this industry is without merit. Even if this

is the sole method of rendering services for compensation in the industry, the claimant was unquestionably seeking customers for his business and was not seeking employment. Accordingly, he was not totally unemployed on any effective day during the period in issue.

The claimant received $913 in benefits, which is an overpayment because he was not eligible to receive them. The benefits were paid on the basis of his false certification that he had done no work at all. These statements were factually false because he had done work in furtherance of his own business on every day. Accordingly, the overpayment is recoverable.

DECISION: The claimant's application to reopen and reconsider the decision of the Board filed November 24, 1976 (Appeal Board 232,819) is granted and the same decision is hereby rescinded.

The initial determinations of the local office are sustained.

The decision of the referee is affirmed.

JAMES R. RHONE, Member
HARRY ZANKEL, Member

APPENDIX B

SUPREME COURT - APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT

March 23, 1978 NOT FOR PUBLICATION

32417- In the Matter of the Claim of
ROBERT MARKUS, Appellant.

PHILIP ROSS, as Industrial
Commissioner, Respondent.

Decision affirmed, without costs.
No opinion.

MAHONEY, P.J., SWEENEY, KANE, STALEY, JR.,
and LARKIN, JJ., concur.

SUPREME COURT - APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT

May 18, 1978

32417- In the Matter of the Claim of
ROBERT MARKUS, Appellant.
PHILIP ROSS, as Industrial Commis-
sioner, Respondent.

Motion for reargument or, in the
alternative, for permission to
appeal to the Court of Appeals,
denied, without costs.

MAHONEY, P.J., SWEENEY, KANE, STALEY,
and LARKIN, JJ., concur.

APPENDIX C

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the thirteenth day of July A.D. 1978

Present, HON. CHARLES D. BREITEL, Chief Judge, presiding.

3 Mo. No. 731 SSD 47
In the Matter of the Claim for Benefits under Article 18 Labor Law, made by Robert Markus, Appellant,

Philip Ross, as Industrial Commissioner, Respondent.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court sua sponte, upon the ground that no substantial constitutional question is directly involved.

Clerk of the Court Joseph W. Bellacosa